

RECEIVED
FEDERAL ELECTION
COMMISSION
SECRETARIAT

SENSITIVE

FEDERAL ELECTION COMMISSION
999 E Street, N.W.
Washington, D.C. 20463

2011 JUN 14 A 11: 28

2011 JUN 14 AM 11: 24

RECEIVED
FEDERAL ELECTION
COMMISSION

CELA

FIRST GENERAL COUNSEL'S REPORT

MUR 6410
DATE COMPLAINT AND
SUPPLEMENT FILED: Oct. 25 and 26, 2010
DATE OF NOTIFICATION: Nov. 2, 2010
DATE OF LAST RESPONSE: Dec. 21, 2010
DATE ACTIVATED: Feb. 15, 2011

EXPIRATION OF SOL: Oct. 22, 2015 to
Oct. 28, 2015

COMPLAINANT: Christopher C. Healy, Chairman, Connecticut
Republican Party

RESPONDENTS: Planned Parenthood Action Fund, Inc.
Blumenthal for Senate and Judith Zamore,
in her official capacity as treasurer
Senator Richard Blumenthal

**RELEVANT STATUTES
AND REGULATIONS:** 2 U.S.C. § 441a(a)(7)(B)
2 U.S.C. § 441b
11 C.F.R. § 109.20
11 C.F.R. § 109.21

INTERNAL REPORTS CHECKED: Disclosure reports; Commission indices

FEDERAL AGENCIES CHECKED: None

I. INTRODUCTION

This matter involves allegations that Planned Parenthood Action Fund, Inc. ("Action Fund") coordinated communications with, and thus made a prohibited contribution to, Senator Richard Blumenthal and his principal campaign committee, Blumenthal for Senate ("Blumenthal Committee" or "Committee") during the 2010 election for U.S. Senate in Connecticut. Upon review of the complaint and responses, there appears to be no basis for concluding that the Action Fund coordinated with Blumenthal or his campaign regarding public

11044300569

1 communications paid for by the Action Fund. Therefore, we recommend that the Commission
2 find no reason to believe that the Action Fund, the Blumenthal Committee, or Richard
3 Blumenthal violated 2 U.S.C. § 441b, and close the file.

4 **II. FACTUAL AND LEGAL ANALYSIS**

5 **A. Factual Background**

6 The Action Fund, a domestic not-for-profit corporation registered in the State of New
7 York, describes itself as “the nonpartisan advocacy and political arm of Planned Parenthood
8 Federation of America.” <http://www.plannedparenthoodaction.org/about-us/about-us.htm>. It
9 engages in “educational and electoral activity, including legislative advocacy, voter education,
10 and grassroots organizing to promote the Planned Parenthood mission.” *Id.* The Action Fund is
11 registered with the Commission as a “qualified non-profit corporation,” *see* 11 C.F.R.
12 § 114.10(c), and has, for many years, filed independent expenditure notices and reports
13 disclosing expenditures on behalf of, or in opposition to, federal candidates.

14 The Action Fund also operates Planned Parenthood Action Fund Inc. PAC (“Action Fund
15 PAC”), which is registered with the Commission as a separate segregated fund. The Action
16 Fund PAC makes both cash and in-kind contributions to federal candidates, some of which
17 involve communications that are coordinated with federal candidates. Action Fund Response at
18 1-2. In 2010, the Action Fund PAC contributed \$4,500 to the Blumenthal Committee, consisting
19 of a \$2,500 contribution on June 10, a \$130 in-kind contribution on August 19 (for “Web hosting
20 for fundraising”), a \$1,370 contribution on September 27, and a \$500 contribution on
21 October 14, 2010. *See* Action Fund PAC 2010 July Monthly, September Monthly, October
22 Monthly and Post-General Reports.

11044300570

1 Richard Blumenthal was a successful candidate in the 2010 general election for
2 U.S. Senator from Connecticut, and the Blumenthal Committee serves as his principal campaign
3 committee. Ellen Camhi served as the Committee's treasurer during the activities at issue.¹
4 Blumenthal's main opponent in the general election was Linda McMahon.

5 The complaint, noting that the Action Fund ran "an independent expenditure campaign in
6 opposition to Linda McMahon," alleges that there is reason to believe that the Action Fund and
7 the Blumenthal Committee "may have coordinated past public communications and may be
8 continuing to coordinate future public communications." Complaint at 2. In 2010, the Action
9 Fund reported a total of \$26,060.31 in independent expenditures on the Connecticut Senate race,
10 consisting of \$22,651.29 for mailers, \$3,373.67 for get-out-the-vote phone calls, and \$35.35 for
11 on-line voter guides. See Action Fund 2010 October Quarterly Report and 2010 Year End
12 Report. The Action Fund reported two mailings in opposition to McMahon, both of which cost
13 \$7,750.43 (\$15,500.86 total). The Action Fund mailed the first piece on October 18, 2010 and
14 the second piece on October 21, 2010, both of which included images of McMahon alongside
15 statements critical of her association with WWE, Inc., a privately controlled entertainment
16 company where she served as CEO just prior to her candidacy. See Action Fund Response,
17 Exhibits B & C. On October 27, 2010, the Action Fund also reported a \$1,686.84 independent
18 expenditure for phone calls in opposition to McMahon; the script contained statements such as
19 "we cannot forget [McMahon] is funding her campaign with the millions she earned using sex,
20 violence and the exploitation of women in her business." *Id.*, Exhibit E.

¹ Camhi also served as treasurer at the time of the filing of the complaint and thus received notice of the complaint. On April 15, 2011, the Blumenthal Committee filed an Amended Statement of Organization listing Judith Zamore as the current treasurer.

1 In alleging coordination, the complaint primarily relies on an October 22, 2010 email
2 from a Blumenthal Committee “press staffer” that was sent to several other Committee staffers.
3 Complaint at 1. The email, a copy of which is attached to the complaint, states: “Hey all –
4 Grossman is looking for misogynistic [sic] photos of women and WWE. Planned Parenthood
5 wants to hit LM hard on it. What do we got?” *Id.*, Exhibit 1. The complaint asserts that the
6 individual referenced in the email is Andrew Grossman and identifies him as an “agent” of the
7 Action Fund who was heavily involved in the organization’s political strategy. *Id.* at 1. The
8 complaint asserts that Grossman “reached out” to the Blumenthal Committee staffer who sent the
9 email and requested that the Committee “assist him in finding images to use in a communication
10 opposing Linda McMahon.” *Id.* at 2. The complaint argues that, as an “agent” of the Action
11 Fund, Grossman “suggested” that the Action Fund create, produce, or distribute such a
12 communication, and the Blumenthal Committee “assented” to the suggestion “by willingly
13 looking for images to provide” *Id.* Further, the complaint argues that the Blumenthal
14 Committee, by “assisting” Grossman in finding such images, was “materially involved” in the
15 communication. *Id.*

16 On October 26, 2010, the complainant filed a supplement to the complaint along with a
17 copy of an Action Fund independent expenditure notice dated October 22, 2010. The
18 complainant alleges in the supplement that, on October 22, 2010, the “same day” that the
19 Blumenthal Committee assented to the Action Fund’s “suggestion” that the Action Fund
20 disseminate public communications opposing Linda McMahon and the “same day” that the
21 Committee was “materially involved” in the content of such communications, the Action Fund
22 “continued its independent expenditure mail campaign in opposition to Linda McMahon.”
23 Complaint Supplement at 2.

11044300572

1 The Action Fund's response denies the complaint's assertion that Andrew Grossman was
2 acting as its agent, and states instead that Grossman was in fact working on behalf of the
3 Blumenthal Committee. While the Action Fund acknowledges that Grossman previously worked
4 as an independent contractor for Planned Parenthood Federation of America to recruit candidates
5 to fill a vacant position, it asserts that his contract ended on May 31, 2010 and that since then,
6 Grossman has not acted as an agent or employee of, or been retained to work on political
7 programs for, Planned Parenthood Federation of America, the Action Fund or the Action Fund
8 PAC. Action Fund Response at 2. Amy Taylor, who managed the PAC and oversaw "all
9 communications that are coordinated with federal candidates," states in an affidavit that
10 Grossman had informed her he was working for Blumenthal when he suggested that the Action
11 Fund "highlight, on social media sites like Twitter," statements concerning the WWE. Action
12 Fund Response, Affidavit of Amy Taylor at 1 ("Taylor Aff."). Grossman "offered to supply the
13 Action Fund with stills and videos that showed abuse of women to use in the suggested
14 communication." *Id.* Taylor states that she "understood" that any communication made by the
15 Action Fund PAC at Grossman's suggestion would be considered an in-kind contribution from
16 the PAC, which would have been permissible up to \$500, the amount remaining within its
17 \$5,000 calendar year limit. *Id.* at 1-2; 2 U.S.C. § 441a(a)(2)(A). However, in order to avoid
18 further speculation and negative publicity following news coverage of the October 22 email, "we
19 abandoned any further consideration of Grossman's suggestions" *Id.* at 2.

20 The Action Fund also provided an affidavit from Jordan Fitzgerald, who managed the
21 Action Fund's "independent expenditure" program and was involved in "all aspects of the
22 planning, creation and execution of the communications involved in those expenditures." Action
23 Fund Response, Affidavit of Jordan Fitzgerald at 1 ("Fitzgerald Aff."). Fitzgerald states that the

11044300573

1 Action Fund decided, in early October 2010, to target a small group of “persuadable women
2 voters in Fairfield County, Connecticut,” with two “negative” mail pieces highlighting
3 McMahon’s positions, followed by a phone call. *Id.* at 2. In designing and implementing these
4 communications, Fitzgerald states that he “did not act on the request or suggestion of the
5 Blumenthal Campaign; present suggestions regarding a communication to the Blumenthal
6 Campaign to which it gave assent; [or] create, produce or distribute a communication after
7 material, or any, involvement by the Blumenthal Campaign . . .” *Id.* at 3. The Action Fund
8 claims that the design, content, timing and audience for its independent expenditure program was
9 in place “well before the October 22 email that gave rise to this complaint.” Action Fund
10 Response at 3.

11 The Action Fund also provided a copy of its firewall policy for the “2010 Election
12 Season,” which states that “Independent Staff” (i.e., staff working on independent expenditures)
13 must not have any discussions or communications with “Coordinated Staff” (i.e., staff working
14 on coordinated activities) or Action Fund consultants or vendors “about the plans, projects,
15 activities or needs of a candidate on whose behalf the Action Fund is planning or conducting
16 independent expenditures.” Action Fund Response, Exhibit A at 1 (“Firewall Policy”). The
17 policy also prohibits “Coordinated Staff” from having conversations with campaigns about such
18 expenditures or from planning or executing the Action Fund’s expenditure activities. Firewall
19 Policy at 2. The response states that “Coordinated Staff” and “Independent Staff” must sign
20 certifications stating that they understand and agree to abide by the policy. Action Fund
21 Response at 2. Taylor and Fitzgerald each confirm in their affidavits that they “reviewed and
22 agreed to abide by” the policy. Taylor Aff. at 1; Fitzgerald Aff. at 1.

1104430057A

1 The Blumenthal Committee's response asserts that the content standard at 11 C.F.R.
2 § 109.21(c) has not been met because public communications disseminated by the Action Fund
3 after the October 22, 2010 email would not have used photos similar to those referenced in the
4 email. Specifically, the Committee avers that, since the only post-October 22 independent
5 expenditures by the Action Fund in opposition to McMahon were for phone calls occurring on
6 October 27, 2010, there was no "visual public communication" by the Action Fund. Committee
7 Response at 3. The Committee states that, "even if the Committee did provide photos to [the
8 Action Fund], there is no reason to believe that the photos were used in any public
9 communications paid for by" the Action Fund. *Id.* The Committee concludes that, not only does
10 the complaint fail to present any information that the Committee provided photos or other "plans,
11 project, activities, or needs" to the Action Fund, there is "no indication that [the Action Fund]
12 ever paid for a communication for which such information was 'material.'" *Id.* at 4.

13 **B. Legal Analysis**

14 The Federal Election Campaign Act of 1971, as amended ("the Act"), prohibits
15 corporations from making contributions in connection with any Federal election, and similarly
16 prohibits candidates and political committees from knowingly accepting such contributions.
17 2 U.S.C. § 441b(a). The Act provides that an expenditure made by any person "in connection,
18 consultation, or concert, with, or at the request or suggestion of," a candidate or his authorized
19 committee or agent is a contribution to the candidate. *See* 2 U.S.C. § 441a(a)(7)(B)(i); 11 C.F.R.
20 § 109.20(a).

21 A communication is coordinated with a candidate, an authorized committee, a political
22 party committee, or an agent of any of the foregoing when the communication is (1) paid for, in
23 whole or part by a person other than that candidate, authorized committee, or political party

11044300575

1 committee; (2) satisfies at least one of the content standards² described in 11 C.F.R. § 109.21(c);
2 and (3) satisfies at least one of the conduct standards described in 11 C.F.R. § 109.21(d).
3 11 C.F.R. § 109.21(a)(1) – (3). An independent expenditure is an expenditure by a person for a
4 communication expressly advocating the election or defeat of a clearly identified candidate that
5 is not made in cooperation, consultation, or concert with, or at the request or suggestion of a
6 candidate, a candidate's authorized committee, or their agents, or a political party committee or
7 its agents. 2 U.S.C. § 431(17); 11 C.F.R. § 100.16.

8 In this matter, the first prong of the coordinated communication test is satisfied because
9 the Action Fund is a third-party payor. 11 C.F.R. § 109.21(a)(1). The second prong of the test,
10 the content standard, is satisfied when a public communication, *inter alia*, (1) expressly
11 advocates the election or defeat of a clearly identified federal candidate, or (2) refers to a clearly
12 identified federal candidate and is publicly disseminated in that candidate's jurisdiction within
13 90 days of the general election.³ 11 C.F.R. § 109.21(c)(3) and (4)(i). Here, the content standard
14 appears to be satisfied by three of the communications reported by the Action Fund as
15 independent expenditures. First, the two mailers, *see supra* at p. 3, appear to constitute public
16 communications that refer to a clearly identified federal candidate (McMahon), and were

² The Commission recently revised the content standard in 11 C.F.R. § 109.21(c) in response to the D.C. Circuit's decision in *Shays v. FEC*, 528 F.3d 914 (D.C. Cir. 2008). The Commission added a new standard to the content prong of the coordinated communications rule. 11 C.F.R. § 109.21(c)(5) covers communications that are the functional equivalent of express advocacy. *See Explanation and Justification for Coordinated Communications*, 75 Fed. Reg. 55947 (September 15, 2010). The effective date of the new content standard is December 1, 2010, after the events at issue in this matter. Even if applied, the new standard would not change the analysis in this Report.

³ A "public communication," is defined as "a communication by means of any broadcast, cable, or satellite communication, newspaper, magazine, outdoor advertising facility, mass mailing, or telephone bank to the general public, or any other form of general political advertising." 11 C.F.R. § 100.26. A "mass mailing" means a mailing of more than 500 pieces of mail matter of an identical or substantially similar nature within any 30-day period. 2 U.S.C. § 431(23). The Action Fund states that its program was targeted to reach 6,500 female registered voters, *see* Action Fund Response at 3, and a news report indicates that the mailers were sent to "roughly 10,000 female independents." Steven Peoples, *Planned Parenthood Targets Women Voters With McMahon WWE Mailers*, CQ ROLL-CALL, Oct. 26, 2010. Accordingly, the mailings at issue appear to qualify as "mass mailings," and, therefore, are "public communications" under the Act. *See* 2 U.S.C. § 431(22) and (23).

11044300576

1 distributed in Connecticut within 90 days of the November 2, 2010 general election. *See*
2 11 C.F.R. § 109.21(c)(4)(i). In addition, the phone call script, *see supra* at p. 3, appears to
3 contain express advocacy under 11 C.F.R. § 100.22(a), since it uses phrases similar to those cited
4 in the regulation (e.g., "Can we count on your vote for Richard Blumenthal . . . ?"). *See*
5 11 C.F.R. § 109.21(c)(3).

6 The third prong of the coordination test, the conduct prong, may be satisfied when, *inter*
7 *alia*, (1) a communication is created, produced, or distributed at the request or suggestion of the
8 candidate or his or her authorized committee, or at the suggestion of the person paying for the
9 communication, and the candidate or his or her committee assents to that suggestion; (2) the
10 candidate or his or her authorized committee is materially involved in certain decisions regarding
11 the communication; or (3) the communication is created, produced, or distributed after one or
12 more substantial discussions about the communication between the candidate and his or her
13 authorized committee and the payor or his or her agents. 11 C.F.R. § 109.21(d)(1)-(3).

14 The conduct prong does not appear to be satisfied in this matter. The Action Fund has
15 provided sworn affidavits from key individuals specifically rebutting any implication that its
16 advertisements were created at the request or suggestion of, with the material involvement of, or
17 after substantial discussions with, the candidate or his agents, thereby negating the existence of
18 conduct at 11 C.F.R. § 109.21(d)(1)-(3). It also appears that the Action Fund had a firewall
19 policy in place that would have prevented information from being transmitted and used in the
20 subject communications, as it was designed and implemented to prohibit the flow of information
21 between its employees and consultants and those of federal candidates, and it appears to have
22 been distributed to relevant employees. *See* 11 C.F.R. § 109.21(h).

11044300577

1 The complaint argues that Andrew Grossman contacted the Blumenthal Committee on
2 behalf of the Action Fund to suggest a particular advertisement critical of McMahon, and that the
3 Blumenthal Committee assented to the suggestion, and became materially involved in the
4 advertisement, by assisting in finding pictures to include in the advertisement. In fact, it appears
5 that Andrew Grossman was actually working for the Blumenthal Committee during the relevant
6 time period and contacted the Action Fund to request that it disseminate communications
7 regarding the WWE that he was creating for the Blumenthal Committee.⁴ See Taylor Aff. at 1-2;
8 Fitzgerald Aff. at 2. Although it is not clear when Grossman first made his request (Taylor only
9 states that, on October 22, 2010, she communicated with Grossman regarding *his* request, see
10 Taylor Aff. at 1), the request does not appear to have been transmitted to the Action Fund staff
11 responsible for creating, producing, and disseminating any of the Action Fund's public
12 communications, all of which appear to have been created and disseminated through the Action
13 Fund's independent expenditure program. See Taylor Aff. at 1; Fitzgerald Aff. at 2-3.
14 Moreover, Taylor, who understood that Action Fund PAC communications based on Grossman's
15 suggestion would be treated "as in-kind contributions from the PAC," states that the PAC made
16 "no communication" based on "Grossman's suggestions." Taylor Aff. at 1-2. In sum, it appears
17 that the Action Fund's "Independent Staff" worked on the public communications opposing
18 McMahon without any input from the "Coordinated Staff," and the "Coordinated Staff" –
19 although receiving a request or suggestion from Grossman about potential Twitter
20 communications – never followed through by creating or disseminating any such
21 communications.

⁴ The Blumenthal Committee's response does not reference Andrew Grossman or state whether anyone contacted the Action Fund on the Committee's behalf.

11044300578

1 Given the Respondents' specific denials and the absence of any other information
2 suggesting coordination, the conduct prong of the coordinated communications regulations has
3 not been met, thus, there appears to be no resulting violation of the Act. Therefore, we
4 recommend that the Commission find no reason to believe that Planned Parenthood Action Fund,
5 Inc.; Blumenthal for Senate and Judith Zamore, in her official capacity as treasurer; or Senator
6 Richard Blumenthal violated 2 U.S.C. § 441b.

7

11044300579

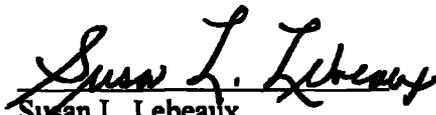
1 **III. RECOMMENDATIONS**

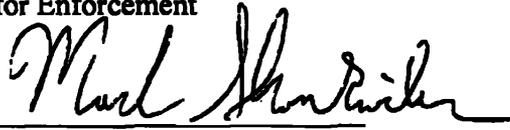
- 2 1. Find no reason to believe that Planned Parenthood Action Fund, Inc. violated
3 2 U.S.C. § 441b.
4
5 2. Find no reason to believe that Blumenthal for Senate and Judith Zamore, in her
6 official capacity as treasurer, violated 2 U.S.C. § 441b.
7
8 3. Find no reason to believe that Senator Richard Blumenthal violated 2 U.S.C. § 441b.
9
10 4. Approve the attached Factual and Legal Analyses.
11
12 5. Approve the appropriate letters.
13
14 6. Close the file.
15

16 Christopher Hughey
17 Acting General Counsel

18 Kathleen M. Guith
19 Acting Associate General Counsel
20 For Enforcement
21

22
23
24
25 June 14, 2011
26 Date

27 
28 Susan L. Lebeaux
29 Acting Deputy Associate General Counsel
30 for Enforcement

31 
32 Mark Shonkwiler
33 Assistant General Counsel
34

35 
36 Thomas J. Andersen
37 Attorney
38
39
40
41
42
43
44

11044300580